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# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931.

No. [redacted] 12

RAFAEL CORTES, as administrator of the goods, chattels and credits of Victor Manuel Santiago, deceased,

*Petitioner,*

*against*

BALTIMORE INSULAR LINE, INC.,

*Respondent.*

## PETITION AND BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.


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New York City.

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*Counsel for Petitioner.*

BASIL O'CONNOR,
JESSE L. ROSENBERG,
WILLIAM F. SNYDER,
*Of Counsel.*

# INDEX.


PAGE

Petition ..... 1

Brief ..... 5

Statement of Facts ..... 5

Merchant Marine Act of 1920, §33 ..... 7

POINT I. By virtue of the decision in the instant case and the recent decision in *Harris* v. *Pennsylvania Railroad Co.* (C. C. A., Va. 1931), 50 F. (2d) 866, there arises a serious conflict of opinion and authority between the Circuit Courts of Appeals for the Second and Fourth Circuits in respect to the interpretation and application of section 33 of the Merchant Marine Act of 1920 ..... 8

POINT II. The failure to provide cure to a seaman can be deemed "negligence" within the meaning of the Employers' Liability Act, and the Circuit Court of Appeals erred in its holding to the contrary ..... 11

POINT III. The Circuit Court of Appeals erred in its interpretation of this Court's decision in *Pacific S. S. Co.* v. *Peterson,* 278 U. S. 130, which it relied on in reaching its decision... 15

POINT IV. The petition for a writ of certiorari should be granted ..... 16

## Table of Cases.


| | PAGE |
|---|---|
| *Attleboro Mfg. Co.* v. *Frankfort Marine, etc., Ins. Co.* (C. C. A. 1st, 1917) 240 Fed. 573 | 14 |
| *Cooley on Torts,* (3rd Ed.), Vol. I, pp. 2, 156 | 15 |
| *Franklin Fire Ins. Co. of Phila.* v. *Weinberg, et al,* (1920), 110 Misc. 644; 181 N. Y. S. 15 | 15 |
| *Harris* v. *Pennsylvania Railroad Co.* (C. C. A. 4th, 1931) 50 F. (2d) 866 | 8, 12 |
| *Kennedy* v. *F. W. Woolworth Co.* (1923), 205 App. Div. 648; 200 N. Y. S. 121 | 15 |
| *Montezuma,* (C. C. A. 2nd, 1927), 19 F. (2d) 355 | 13 |
| *Osgoodby* v. *Talmadge* (C. C. A. 2nd, 1930), 45 F. (2d) 696 | 13 |
| *Pacific S. S. Co.* v. *Peterson* (1928), 278 U. S. 130, 49 S. Ct. 75 | 13, 15 |
| *Rich* v. *N. Y. C. & H. R. R. Co.* (1882), 87 N. Y. 382 | 14 |
| *Schick* v. *Fleishhauer* (1898), 26 App. Div. 210, 49 N. Y. S. 962 | 15 |
| *The Western States* (D. C. W. D. N. Y., 1907), 151 Fed. 929, Aff'd 159 Fed. 354 | 15 |

# SUPREME COURT OF THE UNITED STATES,

## OCTOBER TERM, 1931.

**No. _____**

| | |
|---|---|
| RAFAEL CORTES, as administrator of the goods, chattels and credits of VICTOR MANUEL SANTIAGO, deceased, *Petitioner,* *against* BALTIMORE INSULAR LINE, INC., *Respondent.* | **Petition for Writ of Certiorari to the Circuit Court of Appeals for the Second Circuit.** |

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your Petitioner, Rafael Cortes, respectfully shows to this Honorable Court as follows:

### Nature of Proceeding and Decision Below.

This is an action at law brought in the United States District Court for the Southern District of New York by your Petitioner, as administrator of the goods, chattels and credits of Victor Manuel Santiago, deceased, to recover damages on the ground that the intestate's death was caused by Respondent's negligence. The intestate was a seaman employed by Respondent.

Upon a verdict of a jury, judgment was entered for Petitioner in the amount of $6,022.30, including $5,000.

damages, $515. interest from the date of death, and costs (R., p. 219). On appeal to the Circuit Court of Appeals for the Second Circuit the judgment of the District Court was reversed with an opinion by Judge Swan (R., pp. 237-242), and an order of reversal was entered on August 4, 1931, which directed that an appropriate mandate issue to the District Court (R., p. 243). A petition by your Petitioner to the Circuit Court of Appeals for a rehearing (R., pp. 252-258) was denied by an order entered and filed on December 10, 1931 (R., p. 259).

## Reasons for Granting the Petition.

Your Petitioner urges that the decision of the Circuit Court of Appeals should be reviewed by this Court for the following reasons:

1. By virtue of the decision in the instant case and the recent decision in *Harris* v. *Pennsylvania Railroad Co.* (C. C. A., Va. 1931), 50 F. (2d) 866, there arises a serious conflict of opinion and authority between the Circuit Courts of Appeals for the Second and Fourth Circuits in respect to the interpretation and application of Section 33 of the Merchant Marine Act of 1920 (46 U. S. C. A. §668).

2. The Circuit Court of Appeals erred in holding that the failure to provide "cure" to a seaman cannot be deemed "negligence" within the meaning of the Employers' Liability Act, which is made applicable to seamen by incorporation into Section 33 of the Merchant Marine Act of 1920.

3. The Circuit Court of Appeals erred in its interpretation of this Court's decision in *Pacific S. S. Co.* v. *Peterson*, 278 U. S. 130, which it relied on in reaching its decision.

WHEREFORE, your Petitioner prays, in view of the foregoing reasons, that a writ of certiorari may issue out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Second Circuit, requiring said Court to certify and send to this Honorable Court a transcript of the records and proceedings in this case, to the end that the decree of said Court may be reviewed, and that your Petitioner may have such other and further relief in the premises as to this Court may seem appropriate.

BASIL O'CONNOR,
JESSE L. ROSENBERG,
*Counsel for Petitioner.*

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

BASIL O'CONNOR, being duly sworn, deposes and says that he is one of the counsel for the above named Petitioner; that he has read said petition and that said petition is true to the best of his knowledge, information and belief.

BASIL O'CONNOR.

Sworn to before me this
29th day of February, 1932.
ALICE W. JUDGE,
Notary Public
Notary Public, New York County
New York County Clerk's No. 77
New York County Register's No. 3-J-48
Commission Expires Mar. 30, 1933.
[NOTARIAL SEAL]

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1931.

RAFAEL CORTES, as administrator of the goods, chattels and credits of Victor Manuel Santiago, deceased,
*Petitioner,*

*against*

BALTIMORE INSULAR LINE, INC.,
*Respondent.*

**Brief in Support of Petition for Writ of Certiorari to the Circuit Court of Appeals for the Second Circuit.**

## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Application is made under Section 240 (a) of the Judicial Code for certiorari to review a final order in law rendered by the Circuit Court of Appeals for the Second Circuit on August 4th, 1931, and shown at page 243 of the Record. (Petitioner's petition for a rehearing was denied by the Circuit Court of Appeals by an order entered December 10, 1931 and shown at page 259 of the Record.) The decision of the Circuit Court of Appeals is reported in 52 F. (2d) 22.

### Statement of Facts.

In October, 1928, Petitioner's intestate, Victor Manuel Santiago, was a seaman on board the Steamship *Delisle* (R., pp. 16, 144), owned and operated by Respondent

(R., pp. 3, 8). On October 16, 1928 the *Delisle* left Boca Grande, Florida, and proceeded north along the coast, arriving at Carteret, New Jersey on October 22, 1928 (R., pp. 16, 160).

On leaving Boca Grande, Santiago became ill (R., p. 18). He was dangerously sick during the entire voyage north (R., pp. 19, 26, 55, 205). After the vessel reached Carteret, he was removed to the Staten Island Marine Hospital where his condition was diagnosed as lobar pneumonia, with consolidation on both sides (R., p. 67). He died at 8:45 A. M. on October 23, 1928 (R., p. 72).

Although Santiago was seriously sick on October 17, 1928, the chief mate forced him to work until about noontime that day (R., p. 19). The ship had a hospital room (R., p. 129), but Santiago was kept in the sailors' quarters in the forecastle, which were damp, cold, unsanitary and equipped with insufficient bedding (R., pp. 20-23, 43, 47, 50). No seaman was assigned to take care of him (R., p. 141) and the master personally did nothing for him (R., pp. 127-128). The chief mate admitted he did not give medicine to Santiago (R., p. 139). The only testimony in the case which indicates that any care was given to Santiago is that of the third mate who said he gave him quinine and physics (pills) twice a day (R., p. 152) and of the steward who said he gave Santiago a dose of oil in the morning and epsom salts in the afternoon (R., p. 193).

Although the ship went north along the coast a great part of the trip, Santiago was not put ashore. The steamer dropped anchor in the Raritan River on October 21st at 6:35 P. M. and remained there until the following morning at 6:00 (R., p. 138), but no medical assistance was sought or obtained. When the vessel arrived at Carteret at 8:20 A. M., no physician or anybody else was summoned to assist Santiago (R., p. 160). The

Marine Hospital did not receive the call for an ambulance until 3:00 P. M. on that day (R., p. 75). The patient was reached at 4:20 and admitted to the hospital at 5:45 P. M. (R., p. 75).

Petitioner brought an action at law in the District Court on the theory that his intestate's death was caused by Respondent's negligence. Upon a verdict of a jury, judgment was entered for Petitioner (R., p. 219). This judgment of the District Court was reversed on appeal to the Circuit Court of Appeals by order of August 4, 1931 (R., p. 243) and a rehearing was denied by order of December 10, 1931 (R., p. 259).

**Merchant Marine Act, §33.**

Section 33 of the Merchant Marine Act of 1920 (46 U. S. C. A., §688), referred to herein as the Jones Act, reads as follows:

> "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located."

## POINT I.

**By virtue of the decision in the instant case and the recent decision in Harris v. Pennsylvania Railroad Co. (C. C. A., Va. 1931), 50 F. (2d) 866, there arises a serious conflict of opinion and authority between the Circuit Courts of Appeals for the Second and Fourth Circuits in respect to the interpretation and application of Section 33 of the Merchant Marine Act of 1920.**

In the recent case of *Harris* v. *Pennsylvania Railroad Company* (1931), 50 F. (2d) 866, the Circuit Court of Appeals for the Fourth Circuit reversed a judgment for the defendant entered upon a directed verdict of the District Court for the Eastern District of Virginia in an action at law by Minnie C. Harris, administratrix of the estate of Ernest L. Harris, against the Pennsylvania Railroad Company, to recover damages for his death while in the defendant's employ as a deck hand on a car float of the defendant. The action was instituted under the provisions of Section 33 of the Merchant Marine Act of 1920.

While engaged in the performance of his duties, the intestate fell overboard and was drowned. The evidence disclosed that the members of the crew might have saved him had they used due diligence.

Two main questions were presented on the appeal: (1) Whether when the seaman fell overboard by reason of his own misfortune or carelessness and without negligence on the part of any other member of the crew, the defendant owed him a duty to rescue him from his peril; and (2) if this duty be found to exist, whether there was negligence on the part of the crew in failing to perform it.

The Court answered the first question in the affirmative, saying:

> "We have no doubt that a legal obligation rests upon a ship to use due diligence to save one of the crew, who, by his own neglect, falls into the sea; and that the owners are liable if, by failure to perform this duty, his life is lost."

After reviewing the exceptional nature of a seaman's contract and the peculiar relationship of the seaman to his ship, the court said that, "By reason of these conditions, the maritime law extends to mariners a protection greater than is afforded by the general rules of common law to those employed in service upon the land." The court stated that the duty of the ship to use due diligence to save one of the crew, *both in the case of illness or injury and in the case of a seaman falling overboard*, "* * * is implied in the contract that the ship shall use every reasonable means to save the life of a human being who has no other source of help. The universal custom of the sea demands as much wherever human life is in danger. The seaman's contract of employment requires it as a matter of right."

On the second question the court said:

> "We think also that the evidence was sufficient to justify the submission to the jury of the issue of negligence."

After reviewing the evidence in connection with the acts of the members of the crew to save the seaman, the court said:

> "These obvious facts lead us to conclude that there was evidence of neglect on the part of the crew, and further that it was for the jury to decide whether the man could have been saved if due diligence had been used."

It is obvious from the above opinion and th opinion of the Circuit Court of Appeals for the Second Circuit in the instant case that there is a serious conflict between the two Circuits on an identical question of law. The result of the *Harris* case is to permit a recovery by an administrator under the Jones Act where the jury finds that the crew of a vessel negligently failed to perform its duty to give to a seaman maintenance and cure. In the instant case, although the jury had already found that the officers of the *Delisle* were negligent in their failure to furnish cure to Petitioner's intestate, which resulted in his death, the Circuit Court reversed the judgment below on the ground that the Jones Act was not meant to cover such a case.

These two decisions cannot be reconciled in any spect. In the *Harris* case the Circuit Court held, in effect, that, although the duty to provide maintenance and cure is implied in the contract of employment, the failure to perform the duty may constitute "negligence" within the meaning of the Employers' Liability Act, which, by incorporation into the Jones Act, is made applicable to seamen, because that Act must be construed in the light of the duties arising by virtue of the peculiar relation of a seaman to his ship. The Court recognized in its opinion that a seaman gets greater protection than one employed in service upon the land. In the instant case the Circuit Court held that the duty to provide cure is a contractual obligation and that non-performance of a contractual obligation cannot be deemed "negligence" within the meaning of the Employers' Liability Act. This holding, by the Circuit Court of Appeals for the Second Circuit, was supported by the reasoning that:

> "A railway carrier owes no duty to provide medical treatment to an employee who becomes sick in its service, and no liability would exist for injury or death resulting from a failure to furnish such treatment,"

thus wholly ignoring the tremendous difference between the relationship a railroad employee has with his master and the relationship a seaman has with a vessel.

Petitioner submits that to secure uniformity of decisions, this petition for a writ of certiorari should be granted.

## POINT II.

**The failure to provide cure to a seaman can be deemed "negligence" within the meaning of the Employers' Liability Act, and the Circuit Court of Appeals erred in its holding to the contrary.**

The Circuit Court of Appeals has definitely held in its opinion that if a failure to treat a seaman's illness aggravates the disease he suffers, the aggravated condition is a "personal injury" within the meaning of the Jones Act. The Court further held, however, that the duty to provide cure is a contractual obligation, and that non-performance of a contractual obligation cannot be deemed "negligence" within the meaning of the Employers' Liability Act. Petitioner submits that the Court erred in this latter holding.

Because a duty to furnish medical attention to a sick or injured employee is not imposed upon a railway carrier, and therefore there can be no liability under the Employers' Liability Act, as applied to railroads, for failure to provide such medical attention, it does not follow that under the Jones Act, which has incorporated the Employers' Liability Act, there can be no recovery for willful failure to provide medical attention or for negligent conduct in furnishing "cure" to a seaman, when the law has imposed upon the vessel and owner such a duty.

Since the relations between a railroad carrier and an employee are so patently and fundamentally different from the relations between a vessel and seaman, it follows that the duties arising by virtue of those relations are not and cannot be identical. The two fields of law in connection with these two wholly dissimilar master-servant relations have developed along different lines.

As stated in the opinion of the Court, in *Harris* v. *Pennsylvania Railroad Co., supra,* (p. 868):

> "There is no other peaceful pursuit in which the dominion of the superior is so absolute and the dependence of the subordinate so complete, as in that of a sailor upon a vessel at sea. * * * By reason of these conditions, the maritime law extends to mariners a protection greater than is afforded by the general rules of common law to those employed in service upon the land."

It is obvious that the Federal Employers' Liability Act was specifically designed by Congress to apply to conditions as they obtain on railroads. The difficulty now appears to be to relate such a statute, not specifically designed to apply to any other conditions, to conditions obtaining on navigable waters. It is reasonable to assume, therefore, that when the Employers' Liability Act was incorporated into the Jones Act it was intended to apply to the peculiar situations arising and duties applying on navigable waters, and not to those situations arising or duties applying in railway cases. To make sense it must be construed and interpreted in the light of existing *maritime* law—not railroad law.

Petitioner submits that the Circuit Court of Appeals erred in assuming that the only duties whose breaches create liability under the Jones Act are those arising by virtue of the master-servant relation on railroads.

The Circuit Court of Appeals further stated that the Federal Employers' Liability Act presupposes an ac-

tionable tort, not liability under a contract. It is true that the duty to provide maintenance and cure may be *called* a contractual obligation, but that is merely academically calling the duty a name. The duty is imposed by operation of law and "grows out of that which was termed in the *Montezuma* (C. C. A.) 19 F. (2d) 355, 356, the 'personal indenture' created by the relation of the seaman to his vessel", (*Pacific S. S. Co.* v. *Peterson*, 278 U. S. 130, 49 S. Ct. 75). The duties imposed upon a railway carrier in connection with an employee also grow out of the contractual relation between them and they might just as validly be called contractual obligations. It is obvious that without the contract there would not be the duty. The protection the law seeks to give to an employee, especially to a seaman who requires it most, should not be denied and the statute providing a remedy unduly narrowed by technical distinctions in nomenclature.

Furthermore, assuming that the duty to provide maintenance and cure may be contractual, nevertheless, a willful failure to perform the duty, or negligent conduct in its performance may be a tort as well as a breach of contract. There is abundant authority for the proposition that a tort may grow out of, or be coincident with a contract.

In *Osgoodby* v. *Talmadge*, (1930), 45 Fed. (2d) 696, the Circuit Court of Appeals for the Second Circuit by Swan, J., said in part:

> "Of course, there are numerous classes of contracts, where the promisor's conduct may constitute both a breach of his promise and a tortious violation of some other legal duty closely related to the contractual duty; in such case the promissee may have his election between a remedy *ex contractu* and *ex delicto*. Negligent transportation of goods under a contract of carriage is, perhaps, the most obvious example."

In *Rich* v. *N. Y. C. & H. R. R. Co.*, (1882), 87 N. Y. 382, at page 390, the Court said:

> "And yet, it is conceded that a tort may grow out of, or make part of, or be coincident with a contract (2 Bouvier (*supra*),), and that precisely the same state of facts, between the same parties, may admit of an action either *ex contractu* or *ex delicto*. (Cooley on Torts, 90.) In such cases the tort is dependent upon, while at the same time independent of the contract; for if the latter imposes a legal duty upon a person, the neglect of that duty may constitute a tort founded upon a contract. (1 Addison on Torts, 13.)"

In *Attleboro Mfg. Co.* v. *Frankfort Marine, etc. Ins. Co.*, (1917) 240 Fed. 573, the plaintiff sued the defendant insurance company in tort for the recovery of damages caused plaintiff by the negligent defense by the insurance company of the action instituted by one of plaintiff's employees for damages suffered as the result of an injury sustained in plaintiff's plant.

The relationship between the parties giving rise to the torts complained of was established by the contract of insurance, several provisions of which plaintiff pleaded. The defendant contended that the cause of action was in contract and not in tort. The circuit court overruled that contention, saying in part (page 579):

> "The plaintiff does not seek in any of the counts to recover damages for a breach of contract, and the contract is not set out for the purpose of showing that its obligations have been broken by the defendant. The allegations of this character were made for the purpose of showing the relationship existing between the parties, and the rights of the plaintiff in the subject-matter as to which the defendant was dealing and which it was bound to anticipate might be infringed if it failed to use due care in the performance of the duties imposed upon it by law."

As in the above case, last cited, the relationship between the parties in the instant case was created by contract out of which grew duties imposed by law, which Respondent was "bound to anticipate might be infringed if it failed to use due care in the performance of the duties imposed upon it by law." A failure to use due care in the performance of those duties or a willful failure to perform them clearly constitutes "negligence" or a tort.

See also:

*The Western States,* (1907), 151 Fed. 929, Aff'd 159 Fed. 354;

*Schick* v. *Fleishhauer,* (1898), 26 App. Div. 210, 49 N. Y. S. 962;

*Franklin Fire Ins. Co. of Philadelphia* v. *Weinberg, et al.* (1920), 110 Misc. 644; 181 N. Y. S. 15;

*Kennedy* v. *F. W. Woolworth Co.* (1923), 205 App. Div. 648; 200 N. Y. S. 121;

*Cooley on Torts,* (3rd Edition), Vol. I, pp. 2, 156.

## POINT III.

**The Circuit Court of Appeals erred in its interpretation of this Court's decision in Pacific S. S. Co. v. Peterson, 278 U. S. 130, which it relied on in reaching its decision.**

The Circuit Court of Appeals stated in its opinion that *Pacific S. S. Co.* v. *Peterson,* 278 U. S. 130, is "an intimation that the Supreme Court thinks the old rights and remedies in respect to maintenance and cure outside the

scope of the statute" (the Jones Act) (R., p. 241). Petitioner believes that the case holds no more than that the Jones Act does not take away from a seaman his right to enforce the *old contractual rights*, to the same extent and in the manner in which they were enforced prior to the enactment of the Jones Act, independent of any new rights or remedies which were given him under the Jones Act. The case does not hold that a seaman does not have rights under the Jones Act to recover for tortious injury resulting from the failure to perform duties imposed by law in connection with maintenance and cure. The fact that the decision stated that the rights are cumulative seems to compel an opposite conclusion. Petitioner submits, therefore, that the Circuit Court of Appeals erred in relying on that case to support its decision that Petitioner cannot recover in the instant case under the Jones Act.

## POINT IV.

**The petition for a writ of certiorari should be granted.**

Respectfully submitted,

BASIL O'CONNOR,
JESSE L. ROSENBERG,
*Counsel for Petitioner.*

BASIL O'CONNOR,
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WILLIAM F. SNYDER,
*Of Counsel.*